[Cite as *KMV V Ltd., v. DeBolt,* 2011-Ohio-525.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

KMV V LTD.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0032**
- vs -	:	
JASON A. DEBOLT,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2004 CV 0911.

Judgment: Affirmed.

Stephen D. Dodd, Meyers, Roman, Friedberg & Lewis, 28601 Chagrin Boulevard, #500, Cleveland, OH 44122 (For Plaintiff-Appellee).

George W. Cochran, Smith, Greenberg & Leightty, P.L.L.C., 2321 Lime Kiln Lane, Ste. C, Louisville, KY 40222 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellant, Jason DeBolt, appeals the April 19, 2010 Judgment Entry of the Portage County Court of Common Pleas, in which the trial court overruled DeBolt's Motion for Relief from Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} KMV V Ltd. (KMV) owns P & M Estates, a mobile home park located in Garrettsville, Ohio. DeBolt, was a tenant of P & M Estates from July 1, 2001, through the end of 2004. KMV and DeBolt are also opposing parties in a class action

proceeding in the Portage County Count of Common Pleas, involving flooding damage that occurred to DeBolt's and others' mobile homes.

{¶3} On July 19, 2004, KMV filed a Complaint for Forcible Entry and Detainer and Damages against DeBolt, claiming that DeBolt failed to pay his rent and was a holdover tenant. DeBolt filed an Answer and Counterclaim on August 13, 2004, asserting six counterclaims against KMV.

{¶4} On November 15, 2004, the trial court held an eviction hearing, and the magistrate recommended eviction of DeBolt for failure to pay rent and because DeBolt was a holdover tenant. DeBolt filed objections to the Magistrate's Decision. The trial judge adopted the Magistrate's Decision and issued a Writ of Execution on December 9, 2004.

{¶5} Prior to trial on DeBolt's counterclaims and KMV's damages claim, the trial court disposed of all but one of DeBolt's counterclaims by granting KMV's Motion to Dismiss and Motion for Summary Judgment. All that remained at issue on the scheduled trial date were KMV's damages claim for unpaid rent and DeBolt's retaliatory eviction counterclaim.

{¶6} This case was set for trial on September 1, 2009. On September 1, prior to selection of the jury, the parties reached a resolution and indicated that they would settle the case. This discussion surrounding the settlement agreement was recorded and placed on the record before the trial judge. After DeBolt indicated that he believed he still owed around five thousand dollars on his mobile home, KMV agreed to pay off the balance of DeBolt's loan on his mobile home, "provided *** the balance is *** somewhere in the range of four or five [thousand dollars]." Additionally, KMV's attorney,

Stephen Dodd, agreed to negotiate on behalf of DeBolt, attempting to achieve a favorable notation on DeBolt's credit report regarding the eviction proceedings, provided DeBolt signed a written waiver of conflict of interest.

{¶7} KMV's owner, DeBolt, and counsel for both parties stated at the end of the settlement discussion that they agreed to the settlement reached.

{¶8} On October 26, 2009, KMV filed a Motion to Enforce Settlement Agreement and for an Award of Attorney's Fees.

{¶9} On October 30, 2009, the trial court issued an Order and Judgment Entry dismissing the case "pursuant to the terms of the parties' mutually agreed settlement agreement," as described in the Order. The terms of the settlement required the parties to do the following: KMV was to purchase DeBolt's mobile home for the negotiated principal loan payoff value, with KMV to receive title; KMV's counsel, Attorney Dodd, would represent DeBolt, without charge and in cooperation with DeBolt's counsel, Attorney George Cochran, in negotiating a lower payoff rate for the mobile home and would help DeBolt to obtain a favorable credit notation relating to the eviction action filed by KMV; DeBolt was to sign appropriate waivers of a conflict of interest regarding the representation by Attorney Dodd; and the parties agreed to allow DeBolt to retain his claim for damages to personal property in the separate class action case.

{¶10} On November 25, 2009, DeBolt filed a Motion for Relief from Judgment, arguing that, under Civ.R. 60(B), there were several mutual mistakes of fact and that fraud occurred in reaching the settlement agreement.

{¶11} On December 2, 2009, DeBolt filed an appeal from the October 30 Entry with this court. On March 5, 2010, DeBolt's appeal was dismissed on the grounds that

DeBolt's Notice of Appeal was not filed in a timely manner, as required by App.R. 4(A). *KMV V, Ltd. v. DeBolt*, 11th Dist. No. 2009-P-0079, 2010-Ohio-827, at ¶¶6-7.

{¶12} On April 19, 2010, the trial court issued an Order and Judgment Entry, denying DeBolt's Motion for Relief from Judgment, finding that DeBolt's motion did not meet the requirements of *GTE Automatic Elec., Inc. v. ARC Industries, Inc*. (1976), 47 Ohio St.2d 146.

{¶13} DeBolt timely appeals and raises the following assignment of error:

{¶14} "The trial court committed prejudicial error by granting [Appellee's] motion to enforce a settlement agreement that was induced by [Appellee's] own fraud and fatally infected with material errors that negate the parties' intent."

{¶15} "[A]n order denying a motion for relief from judgment is reviewed by this court under an abuse of discretion standard." *Len-Ran, Inc. v. Erie Ins. Group*, 11th Dist. No. 2006-P-0025, 2007-Ohio-4763, at ¶15, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. "Because Civ.R. 60(B) is remedial in nature, courts should liberally interpret motions for relief so that a case may be decided on the merits. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248." *Len-Ran, Inc.,* 2007-Ohio-4763, at ¶15 (citation omitted).

{¶16} Before we can address DeBolt's assignment of error, we must address an issue raised by KMV in its appellate brief. KMV asserts that DeBolt's sole assignment of error relates not to the April 19, 2010 Judgment Entry, which is the Entry from which this appeal was taken, but instead relates to the trial court's October 30, 2009 Judgment Entry. The October Entry was the subject of a prior appeal to this court and was dismissed as untimely. KMV contends that the current appeal is an attempt to

circumvent App.R. 4(A), which requires parties to file a notice of appeal within thirty days of a judgment entry.

{¶17} KMV argues that an appellate court should not have to search for or develop a foundation for an appellant's claims, citing *Bank One v. Salser*, 4th Dist. No. 05CA1, 2005-Ohio-3573.

{¶18} *Bank One* is distinguishable from the current case. "Not once does Bank One's appellate brief mention Civ.R. 60(B) or the three-prong test for obtaining relief under that rule. *** Rather, the main focus of the brief is the question of whether the trial court erred in dismissing the case on May 11, 2004. However, Bank One did not appeal this judgment within thirty days as required by App.R. 4(A)." *Bank One,* 2005-Ohio-3573, at ¶7.

{¶19} In *Bank One*, the court was unable to find any mention of Civ.R. 60(B) in the appellant's brief, although the appellant was purportedly appealing from a Judgment Entry denying appellant's 60(B) motion. We agree with KMV that the wording of DeBolt's assignment of error is imprecise and refers to KMV's Motion to Enforce a Settlement Agreement, the subject of the October Entry, which was untimely appealed to this court and dismissed. *KMV V*, 2010-Ohio-827, at ¶¶6-7. However, the assignment of error further discusses fraud and material errors, the subject of DeBolt's 60(B) motion. The focus of the current appeal is the 60(B) claim and arguments supporting that claim are asserted throughout DeBolt's brief, regardless of the imprecise wording of the assignment of error.

{¶20} Additionally, there is no evidence that DeBolt is using this appeal to circumvent this court's dismissal of the prior appeal as untimely. DeBolt filed his 60(B)

motion with the trial court on November 25, 2009, before he had even filed his initial, untimely appeal with this court and well before this court dismissed his initial appeal. DeBolt did not file a 60(B) motion with the trial court simply to create another avenue to appeal to this court, as he was unaware his initial appeal would be dismissed.

{¶21} The entire content of DeBolt's brief addresses his 60(B) motion, which was the subject of the trial court's April 19 Entry, and his 60(B) motion does not appear to circumvent this court's prior ruling dismissing DeBolt's appeal as untimely. Therefore, this court has jurisdiction to hear DeBolt's sole assignment of error.

{¶22} Regarding DeBolt's sole assignment of error, DeBolt asserts that he should be granted relief from the court's judgment under Civ.R. 60(B) and that "all three factors justifying relief under Rule 60(B) are present in the instant case," such that the trial court erred in overruling his motion.

{¶23} The Ohio Supreme Court set forth the standard for granting a Civ.R. 60(B) motion as follows: "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic*, 47 Ohio St.2d 146, at paragraph two of the syllabus.

{¶24} "The Supreme Court has made clear that the movant must meet all three [of the foregoing] criteria to be entitled to relief." *Senoyuit v. Senoyuit*, 11th Dist. No. 2007-T-0082, 2008-Ohio-2003, at ¶12. "If any of these three [*GTE Automatic*]

requirements is not met, the motion should be overruled". *Rose Chevrolet*, 36 Ohio St.3d at 20.

{¶25} Civ.R. 60(B) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; *** (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party."

{¶26} DeBolt argues that he was entitled to relief because both mutual mistake and fraud occurred during the negotiations leading to the ultimate settlement agreement. DeBolt first asserts that mutual mistake existed as to the remaining balance owed by DeBolt on the mobile home and to be paid by KMV.

{¶27} "A contract may be rescinded under the doctrine of mutual mistake when the agreement is based upon a material mistake of fact or law." *In re Estate of Stamm*, 11th Dist. No. 2005-T-0098, 2006-Ohio-5176, at ¶25 (citation omitted). "A mistake is material to a contract when it is 'a mistake *** as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.'" *Reilley v. Richards*, 69 Ohio St.3d 352, 353, 1994-Ohio-528 (citation omitted). Regarding settlement agreements, "[i]f each party is mistaken as to a material fact of settlement, then there could be no meeting of the minds, and thus no valid contract for settlement." *Connolly v. Studer*, 7th Dist. No. 07 CA 846, 2008-Ohio-1526, at ¶24.

{¶28} Unilateral mistake, in contrast to mutual mistake, will not justify granting relief from judgment. "A 'mistake' as used in Civ.R. 60(B)(1) refers to one mutually

made by both parties relating to an operative fact." *Auto Owners Ins. Co. v. Feeler*, 11th Dist. No. 2008-P-0025, 2008-Ohio-6886, at ¶30, citing *Lewis v. Lewis*, 11th Dist. No. 2007-P-0056, 2008-Ohio 730, at ¶24; *Deutsche Bank Natl Trust Co. v. Lane*, 10th Dist. No. 07AP-1015, 2008-Ohio-5369, at ¶15 (mutual mistake required for purposes of 60(B)).

{¶29} DeBolt's failure to be aware of the appropriate value of his property does not constitute mutual mistake. See *Hytree v. Hytree*, 11th Dist. No. 93-L-036, 1994 Ohio App. LEXIS 2544, at *7-*8 (party who failed to have marital property properly valued prior to signing settlement agreement did not qualify for mistake under Civ.R. 60(B)(1)); *Kruppa v. All Souls Cemetery of the Diocese of Youngstown*, 11th Dist. No. 2001-T-0029, 2002-Ohio-713, 2002 Ohio App. LEXIS 773, at *10 (when there is no evidence in the record to indicate that one party was similarly mistaken about the price or value of an item, the mistake is unilateral).

{¶30} The mistake made as to the amount owed by DeBolt on the mobile home was unilateral. DeBolt was mistaken about the actual amount owed on his mobile home, and during settlement discussions, he stated that he owed four or five thousand dollars. DeBolt alleges he actually owes around $10,000 on the mobile home, while KMV alleges that the mobile home debt was eliminated when DeBolt declared bankruptcy. Regardless of how much is actually owed on the mobile home at this time, if anything, the mistake in this instance was not made by KMV, but only by DeBolt, who provided KMV with the improper amount owed. KMV made no mistake and, therefore, there was no mutual mistake regarding the remaining balance owed on the mobile home.

{¶31} DeBolt further argues that there was mutual mistake regarding the conflict of interest in Attorney Dodd's representation of DeBolt, detailed in the settlement agreement, because Dodd cannot represent both KMV and DeBolt. DeBolt asserts that, under the settlement agreement, KMV would be required to negotiate a discount of the mobile home loan amount, since KMV would be paying the balance of the loan, while also getting the lender to designate DeBolt's loan as "paid in full." He asserts that this is an irreconcilable and incurable conflict under Ohio Ethical Rule 1.7 (c)(2). DeBolt argues that this involves "the assertation of a claim by one client against another client represented by the lawyer in the same proceeding."

{¶32} Rule 1.7 of the Ohio Rules of Professional Conduct states, in pertinent part:

{¶33} "(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

{¶34} "(1) the representation of that client will be directly adverse to another current client;

{¶35} "(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

{¶36} ***

{¶37} "(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

{¶38} "(1) the representation is prohibited by law;

{¶39} "(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding." (Emphasis sic).

{¶40} As evidenced by the transcripts of the settlement agreement discussion and the trial court's October 30, 2009 Judgment Entry, the parties did not ultimately agree to have Dodd negotiate with the lenders to designate the loan as "paid in full." Dodd was only to attempt to obtain a favorable notation on DeBolt's credit report related to the eviction proceeding, which is unrelated to the loan negotiations. Therefore, Dodd would not be advocating for two conflicting interests. Additionally, he would not be asserting the claim of one client against another client in the same proceeding or in any proceeding whatsoever. After the settlement agreement was made, the lawsuit was dismissed. The parties were no longer asserting claims against each other and thus, no violation of Rule 1.7(c)(2) exists.

{¶41} Although DeBolt focuses his argument mainly on a Rule 1.7(c)(2) violation, we note that other conflicts of concern under Rule 1.7 can be waived with informed consent and an attorney's ability to give competent representation. DeBolt agreed during settlement negotiations to consent and sign a waiver, allowing Dodd to represent him on the matters discussed above.

{¶42} DeBolt also argues that KMV committed fraud by misrepresenting its financial condition and thus persuaded DeBolt to settle and drop his counterclaim based on such fraud. DeBolt asserts that KMV misrepresented its financial condition when stating during settlement agreements that KMV had a $1.6 million mortgage on the mobile home park, had more than 150 lots occupied in the park, and that its net income

in 2008 was only $1,300. DeBolt asserts that in proceedings before a different judge, KMV admitted that over 200 lots were occupied.

{¶43} First we note that DeBolt offered no evidence that KMV's claims of its $1.6 million mortgage and $1,300 net income were untruthful. Therefore, we will consider only the claim that KMV misrepresented the amount of lots filled in the mobile home park.

{¶44} The only evidence presented by DeBolt as to the amount of lots full in the mobile home park is Attorney Cochran's sworn statement that counsel from KMV stated that 200 lots are currently being rented. It is unclear which counsel made this statement and whether it was Attorney Dodd. There is no indication as to whether there was an intentional misrepresentation to the court. Additionally, the statement alleged in the affidavit occurred two months after settlement negotiations, at which time the amount of lots occupied may have changed.

{¶45} One seeking relief from an agreement of compromise and settlement on the ground of false representations must show that there were false representations of material fact upon which he had a right to and did rely, and, in doing so, was misled to his detriment. *R & K Contrs v. Lone Star Constr. Co.*, 11th Dist. No. 92-T-4809, 1994 Ohio App. LEXIS 1500, at *8, citing *Aetna Ins. Co. v. Reed* (1877), 33 Ohio St. 283, at paragraph one of the syllabus.

{¶46} Regardless of whether KMV had 150 or 200 lots occupied, KMV did not misrepresent its financial condition. KMV's counsel clearly stated that it had a $1.6 million mortgage and in 2008, KMV netted only $1,300. DeBolt has not presented

evidence to refute these claims. Therefore, DeBolt failed to show that KMV committed fraud.

{¶47} As DeBolt failed to meet the second *GTE Automatic* criteria for relief, we need not consider the other two elements. Failure to meet any element justifies the trial court's denial of DeBolt's Motion for Relief from Judgment.

{¶48} DeBolt finally argues that the trial court failed to conduct an evidentiary hearing on his Motion for Relief from Judgment and that this was an abuse of discretion.

{¶49} "The trial court's failure to hold a hearing [on a Civ.R. 60(B) motion] *** does not rise to the level of an abuse of discretion. *** *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14, ***." *HPSC, Inc. v. Estate of Scarso*, 11th Dist. No. 2009-L-176, 2010-Ohio-5397, at ¶20 (citation omitted). The Civil Rules do not require the trial court to hold a hearing before granting or dismissing a Civ.R. 60(B) motion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103 and 107 (where all three *GTE Automatic* requirements were not satisfied, the trial court did not commit error in refusing to grant a hearing to the appellants.)

{¶50} The sole assignment of error is without merit.

{¶51} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, in which the trial court overruled DeBolt's Motion for Relief from Judgment, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.